91-519

No. _____

In The

Supreme Court of the United States

October Term, 1991

LARRY RUSSELL DOSSETT,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied due process where he was tried without a jury and there was no showing that he had ever made a knowing and intelligent waiver of the right to be tried by a jury?

2. Was the Georgia Supreme Court's finding that petitioner's right to a trial by jury was impliedly waived by his failure to object to proceeding to trial without a jury a prohibited ex post facto application of this procedural requirement?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR A WRIT OF CERTIORARI

Petitioner Larry Russell Dossett prays that the Writ of Certiorari issue to the Georgia Supreme Court to review the decision of the Georgia Supreme Court entered June 26, 1991.

OPINIONS BELOW

Reproduced in the appendix to this petition are (1) the decision of the Superior Court of Meriwether County dated March 5, 1990, (2) the decision of the Court of Appeals dated September 4, 1990, (3) the decision of the Georgia Supreme Court dated May 10, 1991, (4) the June

26, 1991, order of the Georgia Supreme Court denying petitioner's Motion for Reconsideration, and (5) the July 3, 1991, order of the Georgia Supreme Court granting petitioner's Motion for Stay of the Remittitur. The Georgia Court of Appeal's decision is reported at 197 Ga. App. 139, 398 S.E.2d 24 (1990). The Georgia Supreme Court's decision is reported at 261 Ga. 362, ___ S.E.2d ___ (1991).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a) which authorizes the grant of the Writ of Certiorari to the highest court of a state in a case where a right, privilege or immunity is specifically claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely Motion for Reconsideration on June 26, 1991. In accordance with Rule 13(1) & (4) of this court, this petition is filed within ninety (90) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, 6th Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution of the United States, Article 1, §9, Paragraph 3:

No Bill of Attainder or ex post facto Law shall be passed.

Constitution of the United States, Article 1, §10, Paragraph 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letter of Marque and Reprisal; coin Money; emit Bills of Credit; make any thing but gold and siler Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law; or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

Larry Russell Dossett was convicted after a bench trial of Driving While Under the Influence of Alcohol in the Probate Court of Meriwether County on December 6, 1988. Petitioner was not advised of his right to a trial by jury and no express waiver of the same was made by him. He appealed his conviction to the Superior Court of Meriwether County which affirmed the conviction. He appealed this decision to the Georgia Court of Appeals contending the trial court lacked jurisdiction because of the lack of a waiver of trial by jury. The superior court's decision was affirmed. He sought and obtained certiorari from the Georgia Supreme Court on this issue. That court in a 5 to 2 decision affirmed the Court of Appeals' decision holding petitioner impliedly waived his right to a trial by jury when he did not object to a trial without a jury.

REASONS FOR GRANTING THE WRIT

In this case the Georgia Supreme Court applied an unexpected and novel construction to the terms of O.C.G.A. §40-13-23(a) which provides:

> No court defined in this article shall have the power to dispose of traffic misdemeanor cases as provided in this article unless the defendant shall first waive in writing a trial by jury. If the defendant wishes a trial by jury, he shall notify the court and, if reasonable cause exists, he shall be immediately bound over to the court in the county having jurisdiction to try the offense, wherein a jury may be empaneled.

At the time of petitioner's conviction and throughout all but the final stage of his appeal in the state system, this statutory provision was rigidly applied by the Georgia courts as a jurisdictional prerequisite in inferior court trials such as the one had by petitioner.

For example, in *Rustin v. State*, 192 Ga. App. 775, 386 S.E.2d 535 (1989), the court held a probate court's failure to first advise a defendant of the right to a jury trial and to obtain his written waiver of a trial in a traffic misdemeanor case, as required by the above statute, is harmful error requiring a reversal of a D.U.I. conviction.

In the subsequent decision in *Snellings v. State*, 194 Ga. App. 552, 391 S.E.2d 36 (1990), the court recognized the written jury trial waiver as a jurisdictional prerequisite and held that even where a defendant orally waives a jury trial the conviction is void unless the court obtains the waiver in writing.

Similarly, in *Davis v. State*, 197 Ga. App. 746, 399 S.E.2d 554 (1990), the court held the appellant's D.U.I. conviction was "a mere nullity" where no written waiver was obtained in the probate court. Importantly, the *Davis* court held that although the written waiver issue had not been raised in the superior court below this was of no consequence. Citing *Barrett v. State*, 183 Ga. App. 729, 360 S.E.2d 400 (1987), the court noted "this is a matter which goes to the subject matter jurisdiction of the probate court and the right to attack the judgment as a nullity is not waived by the failure to attack it before". *Id.*, at 747. See also *Kendall v. State*, 196 Ga. App. 760, 396, S.E.2d 927 (1990).

The reasoning of this line of cases was rejected for the first time by the Georgia Supreme Court in *Nicholson v. State*, 261 Ga. 197, 403 S.E.2d 42 (1991), on April 11, 1991 while petitioner's case was on appeal. In *Nicholson* the court granted certiorari to determine whether the failure of a probate court to obtain a waiver of jury trial can be raised for the first time in an appellate court. In concluding it could not, the court focused on the language of §40-13-23(a) and §40-13-21(a) and (b). By a rather convoluted reasoning the court found §40-13-21, not §40-13-23 governed jurisdiction in the probate courts. This is true the court reasoned because probate courts are not "defined" in §40-13-20 ("municipal courts"). Accordingly, probate courts are not bound by the written waiver of jury trial requirement of §40-13-23(a). And although §40-13-21(b) vests misdemeanor traffic offense jurisdiction in probate courts only where "the defendant waives a jury trial . . . ", there is no written waiver requirement. Therefore, for this reason and because the matter is one of jurisdiction over the person as opposed to subject matter jurisdiction, the waiver could be implied by a failure to object to the lack of a jury in the probate court. In petitioner's case the Georgia Supreme Court majority relied upon *Nicholson* in reaching its decision.

Justices Smith, Bell and Benham dissented in *Nicholson*. In the dissent Justice Benham argued forcefully the result reached by the majority was contrary to the clear and unambiguous language contained in §40-13-21(b) that probate courts are without "jurisdiction" to try traffic offenses unless "the defendant waives a jury trial". He points out that under the provisions of O.C.G.A. §17-9-4 "[t]he judgment of a court having no

jurisdiction of the *person or subject matter*, or void for any . . . cause, *is a mere nullity* and may be so held in any court when it becomes material to the parties to consider it." (emphasis supplied).

The *Nicholson* majority also relied on *Fortson v. State*, 96 Ga. App. 350, 100 S.E.2d. 129 (1957), and *Green v. Auston*, 222 Ga. 409, 150 S.E.2d 346 (1966), in reaching its result. The reliance was misplaced.

Green was not a criminal case. Hence, there was no 6th Amendment right to a trial by jury in criminal prosecutions implication. Moreover, the case dealt with a *superior court* trial and turned on the presence of a state constitutional provision which actually required the parties to demand a jury trial. No such provision was applicable in *Nicholson* or in the petitioner's case.

Fortson involved an effort by a defendant to set aside a *guilty* plea on the ground that he was denied his right to counsel. The opinion recites the defendant was offered counsel but gave no indication that he desired an attorney. Certainly, the implication of waiver is more appropriate in those circumstances than in *Nicholson* and the matter sub judice where petitioner pled *not guilty* and proceeded to trial not expressly waiving any of his rights. The record in this case does not indicate the petitioner was at any time advised of his right to a trial by jury.

Importantly, the Georgia Supreme Court's holding in this case is sharply at odds with the decision of this court in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the subsequent decisions following it which have strongly disapproved of implied wiavers in constitutional analysis. In *Boykin* this court held "after a prisoner raises the question

of the validity of his plea of guilty, the burden is on the state to show that the plea was intelligently and voluntarily entered." *Coniogue v. The State*, 243 Ga. 141, 141, 253 S.E.2d 168 (1979), quoting from *Roberts v. Greenway*, 233 Ga. 473, 211 S.E.2d 764 (1975). The record must *affirmatively reflect* that the guilty plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. *Purvis v. Connell*, 227 Ga. 764, 767, 182 S.E.2d 892 (1971). Similarly, the record must show that the defendant was offered counsel and *intelligently and understandingly rejected the offer*. Anything else is not a waiver. *Purvis* at 766. A knowing and intelligent waiver is an act which can never be lightly presumed and, indeed, the *presumption is against waiver*. *Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973). This rule has been consistently applied by the Georgia court to jury trial waivers in non-traffic offense prosecutions recognizing such errors may be raised for the first time on appeal. *White v. State*, 197 Ga. App. 162, 398 S.E.2d 35 (1990). This Court has held the requirement that pleas and waivers be knowing and intelligent applies to misdemeanors as well as felony convictions. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

The jury trial waiver requirement of the Georgia statutory scheme would appear to be but a legislative effort to insure records of convictions affirmatively reflect defendants were accorded their federal and state right to a trial by jury in criminal prosecutions as required by the decisions of this court construing the 6th & 14th Amendments to the United States Constitution. By its decision in this case and *Nicholson* the Georgia Supreme Court has frustrated that clearly expressed intention and all but

ignored the long line of cases disapproving implied waivers in constitutional analysis.

Moreover, even assuming arguendo the Georgia Supreme Court's construction of the statute is correct, due process considerations prevent the application of that interpretation to persons such as the petitioner who were tried before it was rendered. Accused persons should be entitled to rely on the clear language of the statute and the previous judicial decisions interpreting that statute in promulgating an appeal. To apply the procedural changes wrought by *Nicholson* to persons so situated violates the fair warning requirements of the constitutional ex post facto prohibitions contained in Article I, Sections 9 and 10 of the United States Constitution. This prohibition, by virtue of the due process clause, bars state courts as well legislative bodies from passing laws with retroactive effect. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Persons such as the petitioner should therefore be afforded another opportunity to decide if they desire a trial by judge or jury in the inferior court.

CONCLUSION

In this case the Georgia Supreme Court literally changed the rules on the petitioner in the middle of the game. By its decision in this case it retroactively breathed life into a null and void judgment of a court without jurisdiction. Georgia's clear and unambiguous statutory requirement that a waiver of trail by jury be first obtained in an inferior court before jurisdiction attaches was but a legislative embodiment of the decisions of this court that

implied waivers are not acceptable in constitutional analysis. That principle was never more applicable than here where petitioner was not advised of and did not knowingly and intelligently waive his right to have his case heard by a jury. His trial was therefore presumptively unfair.

However, even if the Georgia Supreme Court's construction is correct, the application of this new procedural requirement to this petitioner was wrong and violative of the due process guarantees and ex post facto prohibitions of the United States Constitution.

This court should grant certiorari to consider the compelling questions of constitutional import presented by this case.

Respectfully submitted,

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IN THE SUPERIOR COURT OF MERIWETHER COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
VS.	*	CITATION
LARRY RUSSELL DOSSETT,	*	NO. 90783
	*	
Defendant	*	

APPEAL FROM PROBATE COURT

The above-named Defendant was convicted and sentenced on December 6, 1988 in the Probate Court of Meriwether County of the offenses of driving under the influence and speeding.

Following said conviction and sentencing, the Defendant appealed to this Court pursuant to O.C.G.A. § 40-13-28.

Said case came on for hearing and opportunity was afforded for submission of briefs. None have been submitted.

In accordance with the directions set forth in *Anderson v. City of Alpharetta*, 187 Ga. App. 148 (1988) in connection with appeals pursuant to O.C.G.A. § 40-13-28, this Court has reviewed the record and transcript of the proceedings below. Based on said review, this Court finds that there is sufficient evidence to support the convictions and sentence. Further, the Defendant has asserted no errors in the proceedings below, and this Court finds none.

Accordingly, the findings of guilt as to the offenses of driving under the influence and speeding and the sentences imposed thereon are hereby adopted and affirmed.

This 5th day of March, 1990.

Allen B. Keeble
ALLEN B. KEEBLE
JUDGE OF SUPERIOR COURT
MERIWETHER COUNTY, GEORGIA

BANKE, P.J.
BIRDSONG & COOPER, JJ.

SEP 4 1990

In the Court of Appeals of Georgia.

A90A1322. DOSSETT v. THE STATE. BA-64C.

BANKE, Presiding Judge.

The appellant was convicted in the Probate Court of Meriwether County of driving under the influence of alcohol. His conviction was affirmed on appeal to the superior court pursuant to OCGA § 40-13-28, and this appeal followed. *Held*:

1. The evidence was sufficient to enable a rational trier of fact to find the appellant guilty of driving under the influence of alcohol beyond a reasonable doubt. See generally *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The appellant contends that the probate court was without power to try him for the offense because it failed to obtain from him a written waiver of his right to trial by jury in accordance with OCGA § 40-13-23 (a). See *Rustin v. State*, 192 Ga. App. 775 (2) (369 SE2d 521) (1989). However, inasmuch as the case is before us on appeal from the judgment of the superior court, our inquiry is confined to whether that court erred in affirming the conviction. As there is no suggestion that the waiver-of-jury-trial issue was raised in the superior court, we must conclude that it was not preserved for review in the present appeal and is not properly before us.

3. The appellant further argues that the superior court judge was without authority to render a decision in the case because he "holds one of the judgeships which were ruled to have been illegally created in violation of Section 5 of the Voting Rights Act." However, there is nothing in the record to support any element of this assertion, nor does the record contain any suggestion that this issue was raised in the superior court. Consequently, it presents nothing for review on appeal. See generally *Moore v. State*, 181 Ga. App. 548, 549 (2) (352 SE2d 821) (1987).

Judgment affirmed. Birdsong and Cooper, JJ., concur.

In the Supreme Court of Georgia

Decided: MAY 10 1991

S91G0120. DOSSETT v. THE STATE

PER CURIAM.

Appellant was convicted in probate court of driving under the influence of alcohol. He appealed that conviction to superior court, which affirmed. On appeal to the Court of Appeals, appellant argued that the probate court's judgment was void because there was no written waiver of jury trial. The Court of Appeals held that the issue had been waived by appellant's failure to raise it in the superior court, and affirmed his conviction. *Dossett v. State*, 197 Ga. 139(2) (398 SE2d 24) (1990). We granted certiorari to consider whether the absence from the record of a waiver of jury trial in probate court can be raised in an appellate court if not first raised in superior court.

This case is controlled by *Nicholson v. State*, Case No. S91G0119, decided April 10, 1991. Under the holding of that case, Dossett's failure to raise in the *probate court* the issue of the absence of a waiver of jury trial prevents appellate review of the issue. The implication in the Court of Appeals' opinion in this case that a defendant may preserve this issue by raising it in the superior court is inconsistent with our opinion in *Nicholson v. State*, and is disapproved.

Judgment affirmed. All the Justices concur, except Smith, P. J. and Benham, J., who dissent.

S91G0120. DOSSETT v. THE STATE

BENHAM, Justice, dissenting.

For the reasons stated in my dissent in *Nicholson v. State*, S91G0119, decided April 10, 1991, I respectfully dissent to the judgment in this case.

I am authorized to state that Presiding Justice Smith joins in this dissent.

SUPREME COURT OF GEORGIA

ATLANTA JUNE 26, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91G0120

LARRY RUSSELL DOSSETT V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Smith, P.J., and Benham, J., who dissent.

SUPREME COURT OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

S91G0120

SUPREME COURT OF GEORGIA

ATLANTA JUL 3, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BY: Benham, J.

The following direction was given:

LARRY RUSSELL DOSSETT V. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on June 26, 1991, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to

withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Robert Benham
Justice Robert Benham

No. 91-519

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Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1)

Whether the construction of O.C.G.A. § 40-13-23(a) by the Supreme Court of Georgia so as to require a written waiver of jury trial in a criminal case solely to secure personal jurisdiction over the defendant, a right which is deemed waived if not asserted in the trial court, in any way implicates the right to trial by jury secured by the Sixth Amendment to the United States Constitution?

(2)

If so, whether the Sixth Amendment issue is preserved for review by this Court where the issue was not raised below?

(3)

Whether the construction of O.C.G.A. § 40-13-23(a) by the Supreme Court of Georgia, correcting an earlier, erroneous construction of the Georgia Court of Appeals, implicates the constitutional prohibition against ex post facto laws?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

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Petition For Writ Of Certiorari To
The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner was convicted after a bench trial of the offenses of driving under the influence of alcohol or drugs and speeding in the Probate Court of Meriwether County on December 6, 1988, in an unreported decision. Petitioner appealed to the Superior Court of Meriwether County, which affirmed the conviction in an unpublished order reproduced in the Appendix to the Petition for Writ of Certiorari. On appeal from the Superior Court of Meriwether County, the Georgia Court of Appeals affirmed the judgment due to Petitioner's procedural default in failing to raise the issue before the Superior Court. The

opinion, reproduced as an appendix in the Petition, is reported at 197 Ga. App. 139, 398 S.E.2d 24 (1990). Petitioner then filed a Petition for Writ of Certiorari with the Supreme Court of Georgia, which affirmed, with a modification, the judgment of the Court of Appeals. That opinion, likewise reproduced in the Petition as an appendix, is reported at 261 Ga. 362, 404 S.E.2d 548 (1991).

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), which authorizes review, by writ of certiorari, of a decision of the highest court of a state in a case where a right, privilege, or immunity is specifically claimed under the Constitution of the United States. Respondent concedes that this Court possesses jurisdiction to consider the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Respondent agrees that Petitioner has set forth the relevant constitutional provisions in the Petition.

STATEMENT OF THE CASE

Petitioner was charged with the misdemeanor criminal offenses of speeding and driving under the influence by a law enforcement officer in the State of Georgia. The charges were made returnable to the Probate Court of

Meriwether County. After a bench trial, Petitioner was found guilty on December 6, 1988, and subsequently sentenced.

Georgia's statutory scheme provides for review of that judgment in the Superior Court of the county in which the probate court sits. O.C.G.A. § 40-13-28. Although afforded the opportunity to submit a Brief, Petitioner failed to do so. Following a review of the record and transcript, the Superior Court issued an Order on March 5, 1990, affirming the Probate Judge's determination that Petitioner was guilty of the offenses of driving under the influence and speeding.

From that Order, Petitioner pursued an appeal to the Georgia Court of Appeals, which affirmed the conviction for driving under the influence (the opinion makes no mention of the speeding charge; apparently no appeal was taken from that judgment). Petitioner asserted before the Court of Appeals that the Probate Court lacked jurisdiction to consider the charges due to its alleged failure in failing to obtain a written waiver of jury trial. The Court of Appeals found that Petitioner had failed to preserve the question for appellate review by failing to raise it in the court below (the superior court).

Petitioner then sought certiorari to the Supreme Court of Georgia, which granted the Petition to consider whether the issue raised by Petitioner was, in fact, procedurally defaulted due to Petitioner's failure to raise the issue in the superior court. Subsequent to the grant of certiorari, but prior to the issuance of a decision, the Georgia Supreme Court issued its opinion in *Nicholson v. State*, 261 Ga. 197, 403 S.E.2d 42 (1991). In *Nicholson*, the

court held that the statutory requirement of a written waiver of jury trial addressed the court's personal jurisdiction over the defendant, rather than its jurisdiction over the subject-matter of the charges. Accordingly, the court held in *Nicholson* that failure to raise the lack of a written waiver in the probate court barred all appellate review as to that issue. Accordingly, in the case at bar, the court affirmed the judgment of the Court of Appeals, although disapproving the implication that the issue could be preserved by asserting it for the first time in the superior court. After the denial of a motion for Reconsideration, Petitioner filed a Petition for Writ of Certiorari with this Court.

REASONS FOR DENIAL OF THE WRIT

A. THE CONSTRUCTION GIVEN TO THE GEORGIA STATUTE FAILS TO IMPLICATE ANY CONSTITUTIONAL PROVISION AND IS THUS NOT SUBJECT TO ATTACK BEFORE THIS COURT.

Petitioner first challenges the construction given by the Georgia Supreme Court to the provisions of O.C.G.A. § 40-13-23 and appears to seek this Court's aid in correcting an allegedly erroneous statutory interpretation given by the Georgia Supreme Court. This, of course, is beyond the jurisdiction granted to this Court. The construction of state statutes is a matter for the state courts, and that construction is not subject to review so long as the statute, as construed, does not offend the United States Constitution. *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981);

Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 837 n.9 (1978). Even then, the remedy is not an alternative construction by this Court; rather, the statute must be declared unconstitutional. *Id.*

In an apparently secondary argument, Petitioner also contends that the Supreme Court's holding conflicts with this Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), which requires that a guilty plea be made voluntarily and intelligently with an understanding of the nature of the charge and the consequences of the plea. The *Boykin* analysis is inapplicable as Petitioner did not enter a guilty plea, but was convicted after a trial. Petitioner has failed to point to any decision of this Court requiring or even suggesting that a waiver of jury trial (as opposed to the waiver of trial by the entry of a plea of guilty) be made knowingly, voluntarily, and intelligently. More importantly, however, this issue is simply not presented in the case at bar.

The opinions of the Georgia Supreme Court and the Georgia Court of Appeals do not in any way, shape, or form even purport to address the Sixth Amendment right to trial by jury in a criminal case; rather, the courts have done nothing but interpret a supplemental state statutory provision governing jury trials in criminal cases so as to provide that a defendant seeking a jury trial pursuant to the state statutory provision must affirmatively request that trial or be deemed to have waived it. No federal issue was ever presented by Petitioner to the Georgia courts, and no federal issue has been addressed in their opinions. While it may well be, as Petitioner contends, that the statutory provision in question was enacted by Georgia's General Assembly for the purpose of furthering

this Court's decision frowning upon implied waivers, nevertheless, the statute does not purport to be exclusive in nature, nor an embodiment of the Sixth Amendment's protection, and its construction therefore presents nothing for review by this Court.

B. PETITIONER'S FEDERAL CLAIMS WERE NOT RAISED BELOW, AND ARE THUS NOT PRESERVED FOR REVIEW BY THIS COURT.

Furthermore, the *Boykin* issue was not raised below and is thus not preserved for review by this Court. The opinions of the Georgia Supreme Court and the Georgia Court of Appeals do not in any way, shape or form even purport to address the Sixth Amendment right to trial by jury in a criminal case. No federal issue was ever presented by Petitioner to the Georgia courts, and no federal issue has been addressed in their opinions.

C. THE STATUTORY CONSTRUCTION DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Finally, Petitioner contends that application of the procedural change in question violates the ex post facto provisions contained in the United States Constitution. This Court has recently had occasion to review the application of the ex post facto clause to state criminal statutes. *Collins v. Youngblood*, 497 U.S. ___, 111 L.Ed.2d 30 (1990). The Court, overruling several earlier decisions, held that the ex post facto clause is violated only by punishing as a crime an act previously committed which was innocent when done; by making more burdensome

the punishment for a crime after it has been committed, or by depriving one charged with a crime of a defense available when the act was committed. *Id.*, at 45. Significantly, the Court specifically overruled *Thompson v. Utah*, 170 U.S. 343 (1898), in which the Court had held that a state provision providing for trial by an eight person jury, rather than twelve, violated the ex post facto clause. In overruling *Thompson*, the Court stated that:

> . . . the right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the ex post facto clause.

Id. Thus, the decision of the Georgia Supreme Court correcting a prior erroneous interpretation of the statute in question by the Georgia Court of Appeals in no way implicates the ex post facto clause of the United States Constitution.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari. The correctness of the construction of the statute in question by the Georgia Supreme Court is not a matter for this Court's consideration. The statute in question has no application to the Sixth Amendment right to trial by jury, but is merely a supplemental statutory right to jury trial, which may be granted and waived in accordance with state law. Only

issues regarding the correctness of the statutory interpretation, and the application of state law regarding appellate procedure, were addressed below. The correction of earlier erroneous decisions of a lower court does not violate the ex post facto clause where any modification is procedural only, and does not affect the definition of or punishment for crimes, or preclude a defendant from presenting a previously valid defense to the charges.

Respectfully submitted,

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